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No. 06-22

In The

Supreme Court of The United States

MARK S. WOLFERT, as Executor of the Estate of Elinor M. Wolfert,

Petitioner,

- against -

TRANSAMERICA HOME FIRST, INC., and FINANCIAL FREEDOM SENIOR FUNDING CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) This litigation stems from a California state law class action which concerned certain reverse mortgages. The 1,500 class members were senior citizens. The question is whether service by ordinary mail on said class members of the "settlement opt-out notice" satisfied due process requirements thereby precluding a New York senior citizen member (Petitioner) who did not "opt out" from challenging (on any grounds) her New York reverse mortgage, thereby permitting the lender to take $223,000 (fifty percent {50%} of the equity in Petitioner's home in New York), in addition to repayment of principal and interest.

2) Whether the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 U.S.C. § 1735f-7a(a)(1) preempts New York State law controlling various terms of a New York alternative reverse mortgage.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Marc S. Wolfert, as Executor of the Estate of his mother Elinor M. Wolfert respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

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Matsushita Electric Industrial Co., Ltd. v. Epstein, 516 U.S. 367 (1996).

Grunbeck v. The Dime Savings Bank Of New York, Fsb, 74 F.3d 331 (CA1, 1996).

Stephenson v. Dow Chemical Co., 273 F3d 249 (CA2, 2001).

Epstein v. MCA, Inc., 179 F.3d 641 (CA9, 1999).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Article 4, Section 1 of the United States Constitution, the "Full Faith and Credit Clause".

2. Fifth Amendment of the United States Constitution.

3. Fourteenth Amendment of the United States Constitution.

4. Depository Institutions Deregulation and Monetary Control Act of 1980, 12 U.S.C. § 1735f-7a(a)(1).

5. Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. § 3801 et. seq.

6. New York State Banking Law Section 6-g.

7. New York State Banking Department Regulations 3 NYCRR §79.12(e) and 3 NYCRR § 79.6(b).

OPINIONS BELOW

The Memorandum and Order of Judge Brieant of the United States District Court for the Southern District of New York dated July 30, 2004 was filed August 2, 2004. Said Judgment dismissed Counts 1, 2, 3, 4, 6 and 8 of Petitioner's complaint finding them barred by res judicata because of an all encompassing general release incorporated in a certain California state court class action judgment. The District Court's Order is not reported and is reproduced in the Appendix at 34a.

A subsequent Memorandum and Order of United States District Court Judge Brieant dated January 31, 2005 denied Respondents application for attorney's fees. The District Court's Order is not reported and is reproduced in the Appendix at 29a.

The Decision of the United States Court of Appeals for the Second Circuit was entered in February 24, 2006 affirming the District Court's Judgment of Dismissal. The Decision is reported at 439 F.3d 165 (CA2, 2006) and is reproduced in the Appendix at 5a.

A timely Petition for Panel Rehearing was summarily denied on April 4, 2006. The denial is not reported and is reproduced in the Appendix at 1a.

JURISDICTION

The Court of Appeals judgment was entered on February 24, 2006. A timely petition for rehearing was denied on April 4, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 and this petition is timely filed under Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the final order sought to be reviewed

STATEMENT OF THE CASE

In 1980 Congress passed the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 U.S.C. § 1735f-7a(a)(1) (herein "DIDMCA of 1980") preempting State laws "*expressly limiting the rate or amount of interest, discount points, finance charges, or other charges*" (emphasis supplied).

Two years later Congress passed the Alternative Mortgage Transaction Parity Act of 1982 (12 U.S.C. §3801 et. seq., herein "Parity Act of 1982") designed to control state "alternative mortgages" including the reverse mortgage at issue in this case. *Grunbeck v. The Dime Savings Bank Of New York, Fsb*, 74 F.3d 331 (CA1, 1996).

The DIDMCA of 1980 preempts state laws "expressly limiting" interest on traditional or straight mortgages. By the Parity Act of 1982 Congress aimed to control "alternative mortgage transactions". Congress permitted the states to opt out of the Parity

Act (12 U.S.C. § 3804) which New York did in 1983 (*NY Banking Law§ 6-g*), leaving control of "alternative mortgages" on real property in New York to New York law.

By April 1994, Respondent Transamerica knew that federal law did not preempt New York's alternative or reverse mortgage laws. As was shown below by uncontroverted documentary evidence Transamerica proceeded to draft and lobby into law its own lender friendly New York's reverse mortgage laws.

After shepherding into law its lender-friendly reverse mortgage laws, Respondent Transamerica attacked New York's pent up demand. That demand for reverse mortgages is restricted by New York law to senior citizens. It is designed for those who wished to use their home equity to make up shortfalls in social security income and pensions, pay for uncovered healthcare costs or to fulfill other needs.

In 1996 Respondent Transamerica (herein "Senior Funding") sold Petitioner (herein "Mrs. Wolfert"), then 82 years of age, living alone and a widow, a New York "Reverse Mortgage Under Real Property Law Section 280" secured against Mrs. Wolfert's single family home in Brooklyn, New York (the "reverse mortgage"). Over the next 8 years and on a monthly basis Senior Funding allegedly advanced Mrs. Wolfert a total of $114,961.

Eight years after entering into the reverse

mortgage, Mrs. Wolfert, then 90 years of age, ill with cancer, diabetes and in need of funds for private duty nursing and to proudly avoid having to apply for Medicaid, contracted to sell her home to a third-party.

Upon the 2004 sale of her home Mrs. Wolfert received from Senior Funding a "Final Loan Payoff Demand" which stated Mrs. Wolfert owed:

1) $114,961 in "principal" (loaned over the previous 8 years);
2) $113,520 in "compounded monthly interest" (at 9.5% for the 8 years); and
3) $223,000 in "shared appreciation" calculated as 50% of the difference between Senior Funding's appraisal of Mrs. Wolfert's home in 1996 ($240,000) and the current sales price of $686,000.

Mrs. Wolfert was required to repay a staggering $451,546 for borrowing $114,961. over the course of the previous 8 years.

ARGUMENTS AND DECISIONS BELOW

To prevent Senior Funding from "taking half the equity in her home" ($223,000), Mrs. Wolfert commenced a state court action against Senior Funding alleging illegality, usury, fraud, violation of federal and New York Truth in Lending laws and violation of federal and New York civil rights laws. That action was immediately removed by Senior Funding from the New York State Supreme Court of Orange County to the U.S. District Court for the

Southern District of New York.

In April, 2004, Mrs. Wolfert served her "First Complaint" containing 8 counts or causes of action challenging Senior Funding's New York reverse mortgage on numerous grounds.

Senior Funding moved to dismiss all Counts of the Complaint alleging, *inter alia*:

1. That Mrs. Wolfert's state claims were preempted by the DIDMCA of 1980;
2. Even if not preempted, Mrs. Wolfert's reverse mortgage was lawful; and
3. Mrs. Wolfert's claims were precluded by the doctrine of res judicata and "full faith and credit" because of a certain California state class action judgment.

In response, Mrs. Wolfert argued, *inter alia*:

1. The federal DIDMCA of 1980 did not preempt New York state law controlling her New York alternative reverse mortgage because the DIDMCA of 1980 only controls state laws "*expressly limiting the rate or amount of interest, discount points, finance charges, or other charges*";
2. That the subject reverse mortgage was unenforceable on several grounds; and
3. Mrs. Wolfert's claims were not precluded by "full faith and credit" nor by res judicata and she could collaterally attack the class action judgment

(purportedly binding on all class members) because she was:
(a) not "adequately represented" under *Shutts* and
(b) the class action settlement opt-out notice served by ordinary mail was unconstitutional on several due process grounds.

In his Memorandum and Order (Appendix at page 34a), U.S. District Court Judge Brieant, relying exclusively on *Matsushita Electric Industrial Co., Ltd. v. Epstein*, 516 U.S. 367 (1996), reluctantly dismissed Counts 1, 2, 3, 4, 6 and 8 of Mrs. Wolfert's Complaint on the basis of "full faith and credit" but in doing so stated:

> ***"This case...is a classic example of outrageous abuse of the nationwide class action process by state courts. The nationwide class contained only 1,500 claimants.*** *Mrs. Wolfert became entitled to $2,600 to satisfy what appears to be a viable claim for a far greater amount. Class lawyers in California collected in excess of $2,000,000.00 in fees to adjudicate the claims of the nationwide class. What took place here violates the reasonable expectations of the people of New York including Mrs. Wolfert, that their rights under New York statutes and rules affecting a purely local issue of real property law would be administered and adjudicated in New York. It violated the natural expectations of the New York*

> *legislature, and the New York Banking Department that New York State public policy relating to banking and real estate liens be enforced in the state, by its own administration and courts.* ***This abuse cries out for a statutory or judicially crafted remedy*** *to prevent a state such as California, lacking any commitment to or concern for New York public policy in matters such as this, traditionally of local concern, from exercising power over a nationwide class of absentees such as was done here.* ***This Court must give full faith and credit to the California judgment."*** (emphasis supplied), Appendix bottom 43a.

The District Court did not reach the various defenses raised by Mrs. Wolfert challenging the enforcement of the reverse mortgage (with the Court only commenting that Mrs. Wolfert's claim "appears to be viable for a far greater amount") nor did the District Court reach the issue whether the DIDMCA of 1980 preempted New York's reverse mortgages laws. The District Court simply dismissed most of Mrs. Wolfert's Counts based on finding that the California state class action judgment was entitled to "full faith and credit" therefore precluding Mrs. Wolfert's claims as set forth in Counts 1, 2, 3, 4, 6 and 8 of her Complaint, relegating Mrs. Wolfert to her class action settlement of $2,600. which to date has not been paid.

In a subsequent Decision on Senior Funding's motion for attorneys fees pursuant to the loan agreement Judge Brieant stated:

> *The Court concludes that the fee demand is not squarely within the language of the loan agreement, which should be construed strictly against its author. The claim asserted by Mrs. Wolfert appears to be meritorious, and but for the preclusion imposed upon her by the California State Court, would have been set for trial on the merits by this Court.* (Appendix at 33a).

Mrs. Wolfert appealed the District Court's order dismissing Counts 1, 2, 3, 4, 6 and 8 of her Complaint based on "full faith and credit" to the United States Court of Appeals for the Second Circuit.

Before the Second Circuit Mrs. Wolfert argued, inter alia:

1) That she was not precluded by "full faith and credit" because she was not "adequately represented" in the class action because the California state class action only litigated the narrow issue of "deceptive marketing claims" under specific California business statutes and that Mrs. Wolfert's numerous New York and federal claims were not litigated.

Before the Second Circuit Mrs. Wolfert only

argued a single illegality claim (but provable by Respondent's own testimonial admission from an unrelated federal arbitration proceeding) to highlight the fact that she was not "adequately represented". (*Cf. Shutts* and as enunciated by Justices Ginsburg, Stevens and Souter in *Matsushita* at page 396) If she was not "adequately represented" she was not precluded by "full faith and credit". Mrs. Wolfert did not argue the merits of each of the dismissed Counts 1, 2, 3, 4, 6 and 8 of her Complaint (nor did the Second Circuit discuss in its Decision the various Counts in determining whether Mrs. Wolfert was "adequately represented" by the California class action).

The single claim used to highlight "inadequate representation" was that Senior Funding admitted in testimony that it only sold 50% shared appreciation reverse mortgages. But NY Banking Regulation 3 NYCRR §79.12(e) provides that if a lender only sells one loan program it must be capped at 20%. Ergo their 50% reverse mortgage was unlawful. Further, because it was unlawful NY Banking Regulation 3 NYCRR § 79.6(b) expressly provides that it is not afforded safe harbor from New York's civil and criminal usury laws.

Though this unlawful "shared appreciation" can be mathematically converted to an equivalent interest rate (but only at loan payoff based on how much the borrower's home has appreciated in value from Senior Funding's appraisal at loan inception to the actual sales price at loan termination), this

resulting interest calculation at loan termination is not preempted by the DIDMCA of 1980 because the New York law (which in these circumstances caps shared appreciation at 20%) is not an "express limit" on interest as required by the DIDMCA of 1980.

At loan payoff, after calculating the "50% shared appreciation", Mrs. Wolfert repaid Senior Funding an equivalent of 37% interest (what Respondent calls a "socially responsible, affordable product"), making it usurious under New York law and not preempted by the DIDMCA of 1980.

2) That she was not "adequately represented" in the class action and therefore not precluded by "full faith and credit" because of the conflict of interest of class action counsel. Class action counsel for plaintiffs was actually represented during the course of the class action by the defendant's attorneys in an unrelated action. This was never disclosed to the class action state court.

Adding to this conflict of interest was the fact that said plaintiff's attorneys' were compromised in their faithful representation of the class in that the Class Action Settlement Agreement provided that defendants "will not oppose Class Counsel's application for an award of attorneys fees not to exceed 29% of the Settlement Sum...", in other words they were to receive in excess of $2,000,000. from the defendants' settlement pool.

3) Most importantly and notwithstanding any issue of adequate representation or preemption by the DIDMCA of 1980, Mrs. Wolfert's Complaint was not precluded by "full faith and credit" because:

A) The state class action "settlement opt-out Notice" was a textbook example of "mere gesture" Notice under *Mullane* and blatantly violated constitutional due process principles. The 13 page cryptic, small print deceptive notice was mailed from California by ordinary first class mail to the 1,500 senior citizen class members. Each class member had half the equity in their homes at stake. Mrs. Wolfert had no less than $223,000 at stake. Other seniors had millions of dollars at stake. This would most likely be the most monetary significant event in each of the 1,500 senior citizen's lives, yet each class member was served by ordinary mail;

B) The class action Settlement Agreement expressly required defendants to provide the Claims Administrator (charged with mailing the settlement opt-out Notices) with the *"name and address of any personal contact ..."(such as conservator, executor, administrator or guardian) furnished by the borrower"....* A personal contact for each senior citizen mortgagor is designated in each reverse mortgage. The settlement opt-out notice was admittedly not served on the personal contacts, so Mrs. Wolfert's son, her designated "personal

contact" never received notice, a compounding of the multifarious violations of due process.

Senior Funding argued before the Second Circuit, *inter alia*, that:

The state class action general release, as part of the settlement opt-out Notice, broadly encompassed any and all claims a mortgagor could raise, including Mrs. Wolfert's numerous claims;

The California judgment approving the class action settlement is entitled to full faith and credit in New York. The class action judgment (which incorporates the general release) bars Mrs. Wolfert's various claims under the doctrines of release and res judicata;

Mrs. Wolfert cannot "collaterally attack" the adequacy of either notice or representation because these issues were already determined by the California state court and cannot be collaterally examined;

The Second Circuit's *Stephenson* decision (which permits a "collateral attack") should not be expanded and that *Stephenson* has been rejected by other circuits, most notably *Epstein* from the Ninth Circuit;

Even if the Court expanded *Stephenson* and permitted a "collateral attack", the notice and

representation in the subject class action were adequate;

That the claim alleging a violation of the shared appreciation laws resulting in the reverse mortgage being usurious under New York law was preempted by the DIDMCA of 1980;

Notwithstanding preemption, the reverse mortgage was legal under New York law; and finally

Mrs. Wolfert's claim regarding unlawful shared appreciation under NY Banking Regulation 3 NYCRR §79.12(e) can only be enforced by the government via administrative penalties and license revocation and there is no private cause of action.

The Second Circuit wrote its Decision:

"Without attempting to delineate the degree of divergence of interests that would render class representatives inadequate, it suffices to note in this case that if Mrs. Wolfert is correct that New York law affords her significant protection not available under California law, she was not adequately represented". (Appendix at 21a).

But then the Second Circuit attributed a false premise to Mrs. Wolfert's argument of illegality (nowhere to be found in the briefs or at oral argument) by stating:
"The premise of her argument is that Transamerica failed to comply with a statutory provision requiring

a lender to offer section 280-a reverse mortgages in equal number to section 280 reverse mortgages. (emphasis supplied, Appendix at 22a).

The Second Circuit carried this falsely attributed premise to its next step by stating that any "50-50 argument" was obviously not susceptible to a private citizen's determination as to the number of loans being offered and therefore Mrs. Wolfert has no private cause of action (Appendix at bottom of 22a).

The Second Circuit responded to Mrs. Wolfert's claim that the unlawful shared appreciation once calculated at loan termination resulted in usury, by stating:

"DIDMCA preempts Mrs. Wolfert's claim that these charges create an effective interest rate that exceeds the limit of New York's usury law. (Appendix at 25a).

And again, the Second Circuit relied upon the DIDMCA to preempt Mrs. Wolfert's allegation regarding the illegality of the "maturity fee" under New York law. (Appendix footnote at 24a).

With respect to Mrs. Wolfert's argument that the settlement opt-out Notice violated due process on multiple grounds, the Second Circuit again falsely attributed another argument to Mrs. Wolfert by stating:

"Appellant claims entitlement to notice by certified mail because the average value of each claim in this case, approximately $2,000, was much

higher than the $100 in Shutts, 472 U.S. at 809, in which first-class mail was ruled sufficient due process... " (Appendix at 26a).

To correct four gross errors committed by the Second Circuit,
Mrs. Wolfert filed a Petition for Panel Rehearing stating, *inter alia*:

I) Mrs. Wolfert's claim is $223,000 (half the equity in her home, the unlawful 50% "shared appreciation"), not $2,000. as stated by the Second Circuit (Appendix 26a). Where the Second Circuit got "$2,000" is unknown.

In comparing this made up "$2,000" claim to the $100 claims in Shutts, the Second Circuit correctly did not see much difference and in apparent reliance upon *Shutts* stated first class mail of the opt-out Notice was constitutionally sufficient. But the result should be different when $223,000 is at stake. Here each class member's claim involved no less than half the equity in their home. Mrs. Wolfert's claim is no less than $223,000. Each class member in *Shutts* involved a claim "averaging about $100 per plaintiff".

Here there were 1,500 senior citizen class members. In *Shutts*, "the class as certified was comprised of 33,000" investors.

Mrs. Wolfert's position is that in a state class action which involved only 1,500 senior citizen class members, each with half their home equity at stake,

substantially more is required than 1st class mail of the class action settlement opt-out notice to pass constitutional muster and provide meaningful opt-out notice. Mrs. Wolfert suggested to the Court that at a minimum certified mail should be required so that the 13 page cryptic, small print deceptive "settlement opt-out Notice" mailed with a California return address with the recipients name typed in by computer would not be confused with typical junk mail. Perhaps certified mail would have alerted the senior citizen to the envelope's importance. Perhaps in a case like this actual service of process should be required as the cost to serve 1,500 senior citizens would be insignificant in light of the $8,000,000 settlement pool and the $2,000,000 attorney fee to class action counsel. The ordinary mail service approved by the California state court made it almost a certainty that Mrs. Wolfert would be denied the right to "opt-out".

This is not the case of someone "losing their home" via ordinary mail notice of an impending tax foreclosure sale. In such case, the home owner is charged with knowing that their taxes are unpaid for several years and thus their home is at risk. Mrs. Wolfert cannot be charged with impliedly knowing she was about to be deprived of all rights to challenge her NY reverse mortgage and thus be deprived of half the equity in her home ($223,000).

The Second Circuit compounded the injury by stating in its Decision that summary publication in USA Today made up for any shortfall in notice (Appendix at 27a). But the Second Circuit fails to

mention that such publication notice was in the "Business Section" of the newspaper, again "mere gesture" to the senior citizen members under the reasoning of *Mullane*.

II) Inexplicably the Second Circuit completely misstated the premise of the illegality argument (being used by Mrs. Wolfert to illustrate as a matter of law why there was "inadequate representation" under *Stephenson* and thus no preclusion by "full faith and credit".

The pertinent NY Banking Regulation 3 NYCRR §79.12(e) states: "*Any lender may, at its option, offer only one reverse mortgage loan program provided such program meets the requirements of a 280-a loan.*" 280-a loans are capped at 20% shared appreciation.

Senior Funding admits under oath it ONLY offered one program, a 50% loan. Since it only offered one program it had to be capped at 20%. Ergo, all of Senior Funding's reverse mortgages, which were all capped at 50%, were unlawful.

But the Second Circuit transformed Mrs. Wolfert's argument into attributing to Mrs. Wolfert that she was required to prove the number of 50% versus 20% loans being offered by Senior Funding. This distorted Mrs. Wolfert's argument into something "not realistically amenable to enforcement by a borrower's lawsuit" (Decision, Appendix at bottom of 22a).

Mrs. Wolfert never argued anything about the quantity of loans being offered. Mrs. Wolfert never argued anything about requiring an "equal number" of 50% versus 20% loans. Mrs. Wolfert simply argued that since Senior Funding admitted it only sold one loan (50%) and ZERO 20% loans, every Senior Funding 50% shared appreciation reverse mortgage in New York was unlawful. No math was required. No determination by any agency was needed.

III) The Second Circuit responded to Mrs. Wolfert's conclusion of usury resulting from the unlawful shared appreciation by stating *"insofar as Mrs. Wolfert claims that these charges effectively violate New York's usury statute, the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA) 12 U.S.C. § 1735f-7a(a)(1), preempts her claim."* (Appendix at 24a).

The DIDMCA of 1980 is only applicable to State laws "*expressly limiting the rate or amount of interest, discount points, finance charges, or other charges*". The DIDMCA only controls "traditional or straight mortgages" and does not preempt state laws controlling the "shared appreciation" component of alternative mortgages which is what the federal Parity Act of 1982 was enacted for. *Cf. Grunbeck.* In 1983 New York opted out of the Parity Act of 1982 in order to place control of New York alternative mortgages in New York state law.

Though "shared appreciation" can be

mathematically converted at loan termination to an equivalent interest rate, such interest calculation is not an express limitation on interest within the scope of the DIDMCA of 1980 nor is the reverse mortgage at issue a "traditional or straight mortgage".

IV) The state court approved class action "Settlement Agreement" states:

"IV. "CLASS NOTICE AND CLAIMS ADMINISTRATION"... "that defendants "shall provide to the Claims Administrator"... "the name and address of any personal contact ... furnished by the borrower"...

Each New York reverse mortgage has a section entitled "Designation of Notice Recipient" which sets forth a "personal contact" designated for mortgage foreclosure purposes or repayment purposes in the event of death. It was obviously being utilized in the context of the Settlement Agreement for purposes of the Claims Administrator mailing out the settlement opt-out Notices. The Claims Administrator admittedly did not send the Notice to Mrs. Wolfert's designated "personal contact", her son [1].

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[1] The District Court's statement at the top of Page 7 of its dismissal Order (Appendix at page 43a) that Mrs. Wolfert received the notice is not supported by the record. Perhaps the District Court was referring to "constructive notice" as mentioned in the District Court's footnote on Page 10 of its dismissal Order (Appendix at page 43a). Mrs. Wolfert's only testimony to the District Court was by way of Affidavit wherein she stated she did not recall receiving the mailed

Notwithstanding this language, the Second Circuit ruled (Appendix at 27a.):

"The agreement, however does not require that the Claims Administrator send notice to those personal contacts."

There can be no other purpose for the Settlement Agreement language (bearing in mind it was contained in the Notice section) other than to require the person charged with mailing the Notices (the Claims Administrator) to follow through and mail the Notices accordingly.

On the Petition for Panel Rehearing the Second Circuit summarily "Ordered that said petition be and it hereby is DENIED".

REASONS FOR GRANTING THE PETITION

This Court should not countenance the violation of due process principles reported to the world by the Second Circuit's Decision. The Second Circuit's Decision runs against the grain of *Mullane* and permits a lender to use a foreign class action judgment as a shield to dismiss all challenges and in effect "steal" $223,000 in a senior citizen's home

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Notice; nor could she have read it or any notice by publication in the Business section of a national newspaper due to her failing eyesight.

equity based on a collusive state class action settlement opt-out notice sent by ordinary mail.

Granting certiorari permits this Court to clarify *Shutts* and enunciate what due process requires. The Second Circuit concluded that sending the notice by ordinary mail, despite the $223,000 impact on Petitioner, satisfied the due process clause. Senior citizens, who know nothing about a foreign state court class action that affects what is probably their largest asset, are entitled to receive a document in such manner that it should not be easily mixed up with junk mail.

The California state class action only litigated deceptive marketing claims under specific California business statutes and not the causes of action set forth by Petitioner in Counts 1, 2, 3, 4, 6 and 8 of her Complaint. Despite this very narrow issue of California state law litigation, the general release mailed to each senior citizen class member by ordinary mail encompassed every imaginable claim any of the senior citizen class members could ever raise. Such collusive state class actions can, without real or meaningful notice, preclude all challenges and defenses and thereby eviscerate very substantial and valuable rights and assets of citizens all over the Country.

Under the Second Circuit's overly broad determination that the DIDMCA of 1980 preempts essential terms of New York's reverse mortgage laws, lenders can sell their reverse mortgages with

impunity, irrespective of NY state laws controlling the components of alternative mortgages. In 1983 New York opted out of the federal Parity Act of 1982 intending to control alternative mortgages within the State. The Second Circuit's Decision reverses the legislatures and places within exclusive federal control an important element of traditional state rights over real property within the state. Congress did not intend such an expansion of the preemptions set forth in the DIDMCA of 1980 which if followed will vitiate state laws designed to protect senior citizens. The Second Circuit Decision removes the risk of selling unlawful reverse mortgages to a burgeoning senior population.

CONCLUSION

For the foregoing reasons and in the interests of justice, a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 30, 2006.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date:	3/29/06
Docket Number:	04-5519-cv
Short Title:	Wolfert. v. Transamerica Home First, Inc. DC
Docket Number:	04 -cv-2398
DC:	SDNY (WHITE PLAINS)
DC Judge:	Honorable Charles Brieant

At a stated Term of the United States Court of Appeals for the Second Circuit held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the day 4th of April two thousand six.

Present:

Hon. Jon O. Newman

Hon. José A. Cabranes

Hon. Peter W. Hall,

CIRCUIT JUDGES,

Marc S. Wolfert, as Executor of the Estate of Elinor M. Wolfert,

Plaintiff -Appellant,

V.

Transamerica Home First, Inc. and Financial Freedom Senior Funding Corporation.

Defendants-Appellees.

A petition for panel rehearing having been filed herein by Appellant Marc S. Wolfert,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

For the Court,
Roseann B. MacKechnie, Clerk

By: Tracy W. Young

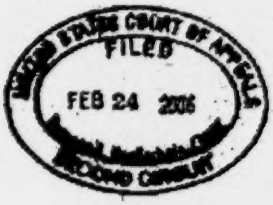
MANDATE

United States Court of Appeals
FOR THE
SECOND CIRCUIT

JUDGMENT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 24th day of February, two thousand and six.

Before: Hon. Jon O. Newman,
Hon. José A. Cabranes,
Hon. Peter W. Hall,
Circuit Judges.



Docket No. 04-5519-cv

Marc S. Wolfert, as Executor of the Estate of Elinor M. Wolfert

Plaintiff-Appellant

v.

Transamerica Home First, Inc. and
Financial Freedom Senior Funding Corporation

Defendant-Appellees

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of

record from the United States District Court for the Southern District of New York and was argued by counsel.

On consideration whereof, it is hereby ORDERED, ADJUDGED and DECREED that the judgement of said District Court be and it hereby is AFFIRMED in accordance with the opinion of this Court.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
By

Tracy W. Young
Motions Staff Attorney

[redacted] Issued as Mandate: 4/11/06

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term 2005

(Argued: December 9, 2005 Decided: February 24, 2006)

Docket No. 04-5519-cv

MARC S. WOLFERT, as Executor of the Estate of Elinor M. Wolfert,
Plaintiff-Appellant,

V.

TRANSAMERICA HOME FIRST, INC. and FINANCIAL FREEDOM SENIOR FUNDING CORPORATION,
Defendants-Appellees.

Before:

NEWMAN, CABRANES, and HALL, Circuit Judges.

Appeal from the September 16, 2004, judgment of the United States District Court for the Southern District of New York (Charles L. Brieant, District Judge), dismissing complaint as barred by res judicata arising from a state court judgment approving a class action settlement.

Affirmed.

Bob Green, Goshen, N.Y. (Neal D. Frishberg, Goshen, N.Y., on the brief), for Plaintiff-Appellant.

David C. Frederick, Washington, D.C. (Priya R. Aiyar, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington,

D.C.; James H. Fleming, Reed Smith LLP, Oakland, Cal., on the brief), for Defendants-Appellees.

JON O. NEWMAN, Circuit Judge.

This appeal presents due process challenges to the preclusive effect of a state court judgment approving a class action settlement. The challenges concern lack of adequate representation and deficiencies in notice of the settlement. Plaintiff-Appellant Marc S. Wolfert as Executor of the Estate of Elinor M. Wolfert ("Mrs. Wolfert") appeals from the September 16, 2004, judgment of the United States District Court for the Southern District of New York (Charles L. Brieant, Judge) dismissing her complaint as barred by res judicata. The complaint sought a declaratory judgment that the reverse mortgage entered into between Mrs. Wolfert and Defendant-Appellee Transamerica Home First, Inc. ("Transamerica") was unenforceable and return of all payments made to the lender. Mrs. Wolfert claimed that two provisions of the reverse mortgage, the "contingent interest" and the "maturity fee" were unlawful under New York law. Transamerica argued, successfully, that her claims were barred by a settlement in a class action in a California state court.

We conclude that Mrs. Wolfert was adequately represented in the California class action, that her challenges to the settlement notice lack merit, and that the California class action judgment therefore bars her current lawsuit. Accordingly, we affirm.

Background

The reverse mortgage. In February 1996, at the age of 82, Mrs. Wolfert entered into a reverse mortgage with Transamerica. As explained by the District Court,

> A reverse mortgage loan is a means by which an individual, usually an elderly person, may borrow on the equity of his or her home, and the lender pays out so much of the loan proceeds as necessary, in agreed periodic installments over the individual's lifetime. The mortgage debt becomes due when the borrower either sells the property or dies, whichever occurs first.

Transamerica lent Mrs. Wolfert an initial amount of $94,987.14. It also agreed to loan her $100 per month for the next 96 months, or until March 1, 2004, as long as she remained alive and did not default on any of the other terms. The maximum total principal amount, as stated in the loan agreement, was $104,587.14. The loan provided for a fixed interest rate of 9.5 percent, compounded monthly. The reverse mortgage contract required Mrs. Wolfert to use part of the initial loan amount, $2,192.46, to purchase a life annuity with Metropolitan Life Insurance Company, which would begin monthly payments after the monthly advances under the loan agreement ended.

Two provisions of the reverse mortgage are especially pertinent to the pending litigation. The most controversial provision obligates the borrower to pay Transamerica a "Contingent Interest" upon various "Maturity Events," including the sale of the property.[1] The amount of the "Contingent Interest" is 50 percent of the difference between the appraised value of the property as of the date of the loan agreement and the time of the triggering event. Mrs.

Wolfert's home was valued at $240,000 at the time of the loan and $686,000 at the time she tried to sell it in 2004. Thus, the amount of the "Contingent Interest" she would have to pay if she sold the home would be half the difference, or $223,000.

The second controversial provision obligates the borrower to pay Transamerica a "Maturity Fee" of two percent of the value of the home at the time of sale.

The California class action. The Transamerica reverse mortgages were challenged in a class action in the Superior Court of San Mateo County, California. That action began as several separate actions in 1998 that challenged various aspects of Transamerica's reverse mortgages. These separate lawsuits were consolidated as the Reverse

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[1]The other "Maturity Events" are the death of the borrower, the borrower no longer using the property as her primary residence, the date of mandatory prepayment due to default, or upon prepayment of the principal amount.

Mortgage Cases. In February 2002, the (then-putative) class representatives filed a third consolidated amended complaint, which stated three causes of action: (1) unlawful, unfair, or fraudulent business practices in violation of California Business & Professions Code § 17200 et seq.; (2) concealment/fraud; and (3) negligent misrepresentation. In September 2002, the California Superior Court granted a motion to certify a nationwide class only as to the first cause of action. The class comprised those who, prior to January 1, 1999, had entered into a reverse mortgage loan with Transamerica that charged identified fees concerning a 50 percent contingent interest, a deferred annuity premium, and/or a 2 percent maturity fee.[2] The class included legal successors-in-interest and heirs of deceased borrowers. Transamerica sold 1,588 of these reverse mortgages, of which 760 had been sold in California. In December 2002, the class representatives and the Defendants reached a settlement and sought court approval of the settlement and the class notice. After a hearing, the trial court gave preliminary approval to the settlement.

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[2]The fees were described as
(1) "Contingent Interest" of 50% of the appreciation in the value of the borrower's property between the date the loan was made and the date it became or becomes due; and (2) a premium for a deferred annuity acquired as part of the loan; and/or (3) a "Maturity Fee" of 2% of the value of the property at the loan's maturity.

The settlement agreement provided for the Defendants to pay a total of $8 million. After legal fees, incentive payments to named plaintiffs, and administrative costs, approximately $5.28 million was available for distribution to class members. The agreement allocated this amount among the 3,422 borrowers (or their successors-in interest) according to whether the loan was open or closed, the number of payments made with respect to closed loans, and the date the loan started with respect to open loans. Mrs. Wolfert expected to receive $2,600 in the settlement.

Class counsel mailed notice of the settlement in February 2003.[3] The notice comprises 13 pages of single-spaced text. On the first page, it identifies the borrower by name and loan number. On pages 5-7, it describes how each borrower's Settlement Share was calculated. On page 8, it describes the release each class member will provide to the Defendants:

> In particular, each class member will be completely releasing all claims, of any kind, he or she has now or may have in the future relating to the facts and claims alleged in the Action, including without limitation (1) the fairness of any of the terms or features of the loan and/or its accompanying annuity, (2) the disclosure or

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[3]Class counsel sent one version of the notice on January 31, 2003. Upon discovering that they had sent an earlier draft of the notice instead of the court-approved version, class counsel sent the correct notice on February 12, 2003. The trial court ratified this course of action on March 4, 2003.

> concealment of the loan's features, including its charges and fees and the cost of the annuity, and (3) the marketing of the loan, including its annuity. .
>
> It should be noted that the claims which class members will be releasing as a condition of the settlement include, but are not limited to, the claims that the named plaintiffs have asserted in the Action and those that the Court has determined are suitable for class-wide treatment. The Released Claims also are not limited to claims arising under California law. The Released Claims include any claims of the described sort, even if the claim has not been asserted in the Action or is too individualized in its facts or relevant law to be suitable for class certification or uniquely arises under the laws of the borrower's home state.

[Proposed] Notice of Class Action and Settlement at 8-9 (emphasis in original). The notice stated that "the full Settlement Agreement" was available "for inspection . . . during regular business hours at the Office of the Clerk of the Superior Court, San Mateo, California." The notice also refers the reader to an Internet address, www.gilardi.com, at which "the Settlement Agreement" was to have appeared. In addition, the Claims Administrator published an advertisement once a week for four consecutive weeks in the business section of USA Today.

The Settlement Agreement is a 29-page, double-spaced document. The release clause uses similar, but not identical, language to that appearing in the Notice:

> Effective as of the Final Effective Date, [the class members] hereby forever completely release and discharge each of the Defendants . . . from any and all causes of action . . . arising now or in the future out of or in connection with or related to the facts and claims alleged or asserted in any of the complaints filed in the Litigation . . . under federal law or the law of any state or locality, including consumer protection laws (the "Released Claims"). The Released Claims include without limitation any claim . . . that any of the terms of the Reverse Mortgage Loans or annuities were unfair or unlawful . . .

Settlement Agreement and Release at 19-20 (emphasis added). The Settlement Agreement states that the Defendants will pay $8 million in total to settle the claims. The agreement also provides that the Defendants would not oppose class counsels' request for an attorney fee award of 29 percent of the settlement amount. The agreement also provides for incentive awards for each of the named plaintiffs in the amount of $10,000 for all but one, who received $2,500. The agreement refers to a Plan of Allocation for the award as Exhibit B to the agreement, but this plan does not appear in the record or on the Internet.

The trial court held a fairness hearing in May 2003. One class member filed an objection, and 18 opted out. Mrs. Wolfert neither objected nor opted out. The trial court rejected all the objections and gave final approval to the settlement in June 2003. In March 2004, the California Court of Appeal affirmed the judgment of the trial court, and the California Supreme Court denied review in July 2004.

The Pending Litigation. Upon learning that before closing on a proposed sale of her house, Mrs. Wolfert would be obligated to pay one of Transamerica's affiliated

companies approximately $450,000 to discharge her loan, she filed a suit in the New York Supreme Court (Orange County) in March 2004, seeking an injunction requiring Transamerica to file a Satisfaction of Mortgage. Transamerica removed the case to the District Court for the Southern District of New York. Mrs. Wolfert then filed an eight-count complaint in the District Court in April 2004, seeking damages and return of the payment required to discharge her loan upon the sale of her home. The eight counts alleged that: (1) the "Contingent Interest" provision violated New York law because it exceeded allowable "future appreciation" interest that may be charged to someone of Mrs. Wolfert's age, (2) the "Maturity Fee" provision violated New York law because it was an unlawful form of "equity participation," (3) the "Maturity Fee" violated New York law because it did not represent actual fees and costs, (4) the initial appraisal fraudulently undervalued Mrs. Wolfert's property, (5) the Defendants failed to meet their obligations under the agreement, (6) the Reverse Mortgage was unconscionable, (7) Mrs. Wolfert was physically and mentally infirm at the time of making the contract, and (8) the Defendants had engaged in fraud and deception entitling Mrs. Wolfert to rescission of the contract.

Transamerica responded with a motion to dismiss, or in the alternative to stay pending arbitration. Transamerica contended that (1) Mrs. Wolfert's claims are barred by res judicata, (2) the New York statutes governing reverse mortgages are preempted by federal law, (3) the reverse mortgage complied with New York law, and (4) any action must be stayed pending arbitration.

In July 2004, the District Court ruled that res judicata, based on the judgment in the California state court class action, barred most of Mrs. Wolfert's claims. Judge Brieant noted that class notice was sent by first class mail

and that Mrs. Wolfert received the notice.[4] The District Court then observed that Mrs. Wolfert had failed to opt out and concluded that she was bound by the judgment of the California court. Judge Brieant dismissed six of the eight claims as "barred by claim preclusion arising out of the California judgment." He did not dismiss the two remaining claims--for breach of contract for failure to make monthly payments, and incapacity of Mrs. Wolfert to enter into a contract--because they did not fall within the scope of the class action release. He also declined to stay the matter pending arbitration, noting that the validity of the arbitration clause depended upon contested factual issues.[5]

In September 2004, the District Court dismissed Mrs. Wolfert's two remaining claims with prejudice, pursuant to a stipulation by both parties, and then dismissed the entire action.

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[4]Judge Brieant also noted that constructive notice, sufficient to satisfy due process, see Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 808 (1985), was provided by publication of the notice for four consecutive weeks in the national edition of USA Today.

[5]On this appeal, Transamerica advances its claim for a stay pending arbitration only as a fall-back position in the event Mrs. Wolfert's complaint is re-instated.

Discussion

The Appellant contends that the District Court erred in giving the California judgment preclusive effect because, she claims, the class representatives did not adequately represent her and the notice was deficient in several respects.

I. Claim of Inadequate Representation

Judge Brieant does not appear to have given explicit consideration to whether Mrs. Wolfert was adequately represented. He noted that "Her transaction clearly brings her within the class as defined," that her first, second, third, fourth, sixth, and eighth claims "allege conduct that falls within the scope of the released claims," that she received notice, and that she failed to opt out. "[T]hus," he concluded, "her claims in this lawsuit are precluded."

In 1940, the Supreme Court first considered whether giving preclusive effect to a judgment in a class action against an absent class member violated the Due Process Clause of the Fourteenth Amendment. See Hansberry v. Lee, 311 U.S. 32 (1940). The Court initially stated that its task was to assure that the absent class member "has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes." Id. at 40.

Had the Court stopped there, an absent class member might have been precluded simply by a judgment rendered after a class action court had given class members adequate notice of settlement terms and afforded them an opportunity to be heard in opposition to the settlement.[6] However, relying on early equity jurisprudence, see id. at 41-42, the Court further stated that the class action judgment would have preclusive effect on absent class members only if "those present are of the same class as those absent and . . . the litigation is so conducted as to insure the full and fair consideration of the common issue." Id. at 43. The Court also referred to "the familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present . . . ." Id. at 42-43.[7]

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[6]Under such a regime, an absent class member receiving adequate notice, even if not adequately represented, would have had to object in the class action court in order to avoid the preclusive effect of the class action judgment. The virtue of such a regime would have been the presentation of all objections, including lack of adequate representation, to the court familiar with the class action. The shortcoming would have been the inconvenience of obliging inadequately represented absent class members to litigate their concern in a distant court, rather than a local court in which the class action judgment is sought to be enforced against them or collaterally challenged by them. Cf. Penn-Central Merger and N & W Inclusion Cases, 389 U.S. 486, 543 n.9 (1968) (Douglas, J., dissenting in part) ("I can find no authority for a rule which would require a party not under the jurisdiction of the inviting court to respond affirmatively to an invitation to intervene or else be bound by an adverse decision."). The subsequent development of adequate representation as a due process requirement for enforcement of a class action judgment has mooted this issue.

[7]For federal class actions, Rule 23 of the Federal Rules of Civil Procedure, adopted in 1937, required and still requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a) (4) (emphasis added).

The Court concluded that the class action judgment in Hansberry would not have preclusive effect because the interests of the representatives in that suit "[we]re not necessarily or even probably the same as those whom they [we]re deemed to represent," and therefore "d[id] not afford that protection to absent parties which due process requires." Id. at 45.

By 1985, the Court could state emphatically, "[T]he Due Process Clause of course requires that the named plaintiff (in a class action) at all times adequately represent the interests of the absent class members." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985); accord Nevada v. United States, 463 U.S. 110, 135 n.15 (1983) (citing Hansberry for the proposition that absent class members could not be bound where the class representatives "had interests that impermissibly conflicted with those of persons represented").

Hansberry decided not only that due process requires fair representation of absent parties (ultimately called "adequate" representation), but also that an absent party denied such representation could collaterally attack the class action judgment. That proposition remains fully effective. "Final judgments remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement." Matsushita Electrical Industries Co. v. Epstein, 516 U.S. 367, 396 (1996) (Ginsburg, J., concurring in part and dissenting in part). This circuit, and many others, have allowed such collateral attacks in recent years. See Stephenson v. Dow Chemical Co., 273 F.3d 249, 260 (2d Cir. 2001), aff'd in part by an equally divided court and vacated in part, 539 U.S. 111 (2003); In re Agent Orange Product Liability Litigation, 996 F.2d 1425, 1435 (2d Cir. 1993); In re Real Estate Title and Settlement Services Antitrust Litigation, 869 F.2d 760 (3d Cir. 1989); Gonzales v. Cassidy, 474 F.2d 67, 72 (5th Cir.

1973); see generally Patrick Wooley, The Availability of Collateral Attack for Inadequate Representation in Class Suits, 79 Tex. L. Rev. 383, 384-86 & nn.1-9 (2000). Thus, Mrs. Wolfert's due process challenge to the preclusive effect of the California judgment depends on whether she was adequately represented by the class representatives.

In considering Mrs. Wolfert's claim of inadequate representation, we face an initial issue of the degree of deference we owe the ruling of the class action court that the class representatives provided adequate representation to the class. Conflicting views on that issue have been forcefully set forth in the majority and dissenting opinions in Epstein v. MCA, Inc., 179 F.3d 641 (9th Cir. 1999), on remand from the Supreme Court, see Matsushita Electric Industrial Co. v. Epstein, 516 U.S. 367 (1996). Judge O'Scannlain, for the majority, appeared to state broadly that the class action court's decision on adequacy of representation precluded a subsequent collateral attack. Epstein, 179 F.3d at 648 ("Simply put, the absent class members' due process right to adequate representation is protected not by collateral review, but by the [Delaware] certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court."). In dissent, Judge Thomas maintained that collateral attack was available because "the [collaterally attacking] plaintiffs seek to raise claims that received neither determination nor review in the Delaware courts." Id. at 656.

As with most issues arising under the Due Process Clause, the ultimate test of whether an adequacy-of-representation ruling by a class action court precludes a collateral attack turns on whether fundamental fairness was lacking. In the class action context, if the class action court ruled only in general terms that representation was adequate, without any adversarial consideration of the claim now

advanced by Mrs. Wolfert that New York law affords her substantial rights beyond those afforded by California law, it would be manifestly unfair to preclude her collateral attack. On the other hand, if, in the class action, a defendant opposing class certification or an objector to the settlement had made a serious argument that a sub-class was required because of claims substantially similar to hers, and that argument had been considered and rejected by the class action court, it would not be unfair to preclude collateral review of that ruling and relegate Mrs. Wolfert to her direct review remedies.[8] It would not be a denial of due process to give full faith and credit to the class action court's ruling on adequacy of representation unless that ruling was made in the absence of an adversarial presentation of the claim that interests substantially similar to those of Mrs. Wolfert's required the designation of a sub-class. However, no such adversarial presentation occurred with respect to her claim that New York law affords her materially more rights than those available under California law. Although the class action court considered and rejected, at the class certification stage, Transamerica's contention that the contract's choice of law provision specifying New York law should be followed,[9] [SPA 134] no one made any claim concerning the content of New York law.[10]

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[8]The concurring judge in Epstein expressed the view that the adequacy-of-representation ruling by the state court was entitled to full faith and credit precisely because the class action court had considered and rejected objectors' specific contention that the collusive nature of the settlement was inconsistent with adequate representation of the class. 179 F.3d at 650-51 & n.1 (Wiggins, J., concurring).

[9]The class representatives contended, and the class action court implicitly agreed, that the choice of law provision should not be followed in a contract of adhesion.

Of course, not every variation between the interests of an absent class member and those of the class generally will render the class representatives inadequate. The adequacy-of-representation determination turns on whether the interests of the class were "compatible" with those of the party attempting to attack the class action judgment collaterally. See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 110 (2d Cir. 2005); see also In re Joint Eastern and Southern District Asbestos Litigation, 78 F.3d 764, 778 (2d Cir. 1996) (explaining that for representation to be adequate pursuant to Federal Rule of Civil Procedure 23(a)(4), class counsel must satisfy certain criteria and "the class

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[10]Transamerica argues that the presence of a named New York plaintiff protected the interests of the New York members of the class. However, the existence of antagonistic groups within the class is not remedied by naming as a representative a member of one of those antagonistic groups. In Amchem, 521 U.S. at 627, the Supreme Court quoted approvingly the following language from our decision in In re Joint Eastern and Southern District Asbestos Litigation, 982 F.2d 721, 743 (2d Cir. 1992), modified on rehearing on other grounds sub nom. In re Findley, 993 F.2d 7 (1993) ("Joint Eastern"): "[W]here differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of distinct subgroups." Even though one of the named representatives, Margaret Mickey as co-executrix of the estate of Kathleen Maloney, could have asserted claims pursuant to New York law, she did not satisfy the adequacy requirement because she did not "represent solely the members of [her] respective subgroup[]." Id.

We note that Amchem appears to have abrogated the suggestion in Joint Eastern that the lack of needed sub-classes could be remedied by an opt-out opportunity. See 982 F.2d at 745. Amchem required sub-classes even though the unitary class was an opt-out class. See Amchem, 521 U.S. at 605.

members must not have interests that are antagonistic to one another" (quoting In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 291 (2d Cit. 1992)). In assessing compatibility, we look at "alignment of interests of the class members" Id. at 113; see Amchem Products, Inc. v. Windsor, 521 U.S. 621, 625 (1997); Stephenson, 273 F.3d at 260-61. There is no litmus test for determining when interests of one or more absent class members are sufficiently distinct from those of the class representatives to render those representatives inadequate. In Hansberry, the interests of the absent class members and those of the class representatives were diametrically opposed. Hansberry, 311 U.S. at 45-46 ("In seeking to enforce the agreement the plaintiffs in [the class] suit were not representing the [collaterally attacking parties] whose substantial interest is in resisting performance."). Without attempting to delineate the degree of divergence of interests that would render class representatives inadequate, it suffices to note in this case that if Mrs. Wolfert is correct that New York law affords her significant protection not available under California law, she was not adequately represented.

Mrs. Wolfert asserts that under New York law the "contingent interest" clause was capped at a 20% interest, rather than the 50% in her loan. In contrast, the class representatives relied upon the general California unfair business practice statute, notwithstanding a choice-of-law provision for New York state borrowers, which provided that New York law governed disputes and acknowledged in their settlement notice that one of the difficulties they would face at trial was in proving that this clause was not "fair."

Determining whether New York law provides Mrs. Wolfert with greater protection than the class representatives were claiming under California law requires examination of New York's statutes governing reverse mortgages.

In 1993, New York revised its Reverse Mortgage statute, creating two separate sections, each covering different types of reverse mortgages. See N.Y. Real Prop. L. §§ 280, 280-a (McKinney 2005 Supp.). Section 280 applies to reverse mortgages for all persons 60 or older; section 280-a applies to reverse mortgage only for those aged 70 or older. Section 280-a loans require several additional protections for the borrowers, such as guaranteeing lifetime occupancy. See id § 280- a (2) (a). Pertinent to Mrs. Wolfert's claim, section 280-a sets a 20 percent cap on the lender's interest in the future appreciation in the home. See id. § 280-a(2) (d). Section 280 does not contain such a cap.

Although Mrs. Wolfert had a section 280 mortgage and does not claim that New York law gives more rights to the borrower with a section 280 mortgage than are available under California law, she nonetheless contends that New York law affords her a basis, not found in California law, to declare her section 280 mortgage void and thereby avoid the contingent interest payment and maturity fee payment for which she became liable upon the sale of her home. The premise of her argument is that Transamerica failed to comply with a statutory provision requiring a lender to offer section 280-a reverse mortgages in equal number to section 280 reverse mortgages. See id. § 280(10). Mrs. Wolfert alleges, and Transamerica does not dispute, that it did not offer any section 280-a loans at the relevant time.

We agree with Transamerica that failure to comply with the 50-50 requirement does not afford Mrs. Wolfert a basis to challenge her section 280 mortgage as either void ab initio or voidable because the provision imposing the 50-50 requirement does not create a private right of action. The provision does not explicitly authorize a private right of action, and cannot be considered to imply one because the 50-50 requirement is not realistically amenable to

enforcement by a borrower's lawsuit. When a lender fails to abide by the 50-50 requirement, which borrowers with section 280 mortgages would be entitled to relief? For example, if, at the end of a calendar year,[11] a lender has issued 60 section 280 mortgages and only 40 section 280-a mortgages, 10 of the section 280 mortgages should have been 280-a mortgages, but which ones? Allowing all 60 borrowers with section 280 mortgages to invalidate their mortgage loans would give 50 borrowers relief to which they are not entitled. The statute provides no basis for determining which section 280 borrowers could sue to enforce the 50-50 requirement. If a lender fails to comply with the 50-50 requirement, the remedy lies with administrative action in the discretion of the Superintendent of Banks.[12] See 3 N.Y. Comp. Code R. & Regs. § 79.13; see also Brian Hoxie's Painting Co. v. Cato-Meridian Central School District, 76 N.Y.2d 207, 212-13, 556 N.E.2d 1087, 1089-90 (1990) (statutory creation of enforcement scheme suggests absence of private right of action).

Mrs. Wolfert also contends that her reverse mortgage is voidable because it violates New York's usury statute. See N.Y. Gen. Oblig. L. § 5-511 (McKinney 2005). The premise

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[11]The 50-50 division is to be determined on a calendar year basis. See 3 N.Y. Comp. Code R. & Regs. § 79.12(a) (2005).

[12]Transamerica also contends that New York law provided an exemption from the 50-50 requirement if government or private insurance was not available at the time. See 3 N.Y. Comp. Code R. & Regs. 79.12(a). However, the record does not indicate whether insurance was available.

of this argument is that a lender offering only one reverse mortgage program must meet the requirements of a section 280-a loan for all loans and that the 50 percent contingent interest of her section 280 loan exceeded the maximum 20 percent contingent interest of a section 280-a loan.[13] She then argues that determining whether Transamerica charged more than the maximum interest rate set by the usury statute requires incorporating this excess into a calculation of the interest rate charged. "In effect," she contends, "the interest charged [her] was in excess of 37% per annum." Br. for Appellant at 11.

We agree with Transamerica that, insofar as Mrs. Wolfert claims that these charges effectively violate New York's usury statute, the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), 12 U.S.C. § 1735f-7a(a) (1), preempts her claim. That section provides, in relevant part:

> The provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is--

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[13]Mrs. Wolfert's claim with respect to the legality of the two percent "maturity fee" relies on a similar analysis--that the effective rate of interest charged by Transamerica exceeded the maximum rate in the usury statute. We reject this claim for the same reasons we reject the claim concerning the contingent interest fee.

> (a) secured by a first lien on residential real property, by a first lien on all stock allocated to a dwelling unit in a residential cooperative housing corporation, or by a first lien on a residential manufactured home;
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> (b) made after March 31, 1980; and
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> (c) described in section 527(b) of the National Housing Act (12 U.S.C. 1735f-5(b)).

Id.

Accordingly, DIDMCA preempts state usury laws to the extent that those laws "expressly limit[] the rate or amount of interest" that a borrower may be charged". Id.; Brown v. Investors Mortgage Co., 121 F.3d 472 (9th Cir. 1997) (Washington usury law); Smith v. Fidelity Consumer Discount Co., 898 F.2d 907 (3d Cir. 1990) (Pennsylvania usury law); In re Lawson Square, Inc., 816 F.2d 1236 (8th Cir. 1987) (holding that DIDMCA, not Arkansas statutes, applied to mortgage interest rates) ; cf. Grunbeck v. Dime Savings Bank of New York, 74 F.3d 331 (1st Cir. 1996) (determining that DIDMCA did not preempt a New Hampshire statute that required interest to be computed on a simple interest basis rather than a compound interest basis but that did not limit the amount of interest to be charged). Therefore, the DIDMCA preempts Mrs. Wolfert's claim that these charges create an effective interest rate that exceeds the limit of New York's usury law.

Moreover, although the scope of DIDMCA preemption is a matter of federal law, New York banking regulations are instructive in that they consider the contingent interest fee not to be interest under New York usury law. See 3 N.Y. Comp. Code R. & Regs. §§ 79.6(b), 79.7(©) ("Such appreciation shall not be considered interest for purposes of any law regulating the maximum rate of interest which may be charged, taken or received, including pursuant to sections 190.40 and 190.42 of the Penal Law."). Therefore, New York law does not support Mrs. Wolfert's claim that the usury law operates in the manner urged. Accordingly, her mortgage is not voidable pursuant to the New York usury law.

II. The Claim of Deficiencies in the Notice

The Appellant argues that the notice was defective for three reasons: (1) the notice should have been sent by certified mail to ensure delivery; (2) the notice should have also been sent to her son, as required by both the California trial court and her loan documents; and (3) the notice deceived class members by failing to alert them that they were relinquishing valuable claims under state law. We reject all three contentions.

The Appellant claims entitlement to notice by certified mail because the average value of each claim in this case, approximately $2,000, was much higher than the $100 in Shutts, 472 U.S. at 809, in which first-class mail was ruled sufficient to satisfy due process, Id. at 812. The ruling in Shutts, however, was not linked to the amount of the claim, and use of first-class mail to send a required notice has regularly been upheld. See Weigner v. City of New York, 852 F.2d 646, 650-52 (2d Cir. 1988) (rejecting argument that due process requires use of certified mail in a tax lien foreclosure action);

Zimmer Paper Products, Inc. v. Berger & Montague, P.C., 758 F.2d 86, 91 (3d Cir. 1985) ("[T]he only decision we have found that even discusses the relative merits of first-class and certified mail in the notice context expressly reaffirms the adequacy of first-class mail." (citing Cayuga Indian Nation v. Carey, 89 F.R.D. 627, 632-33 (N.D.N.Y. 1981)). Moreover, the Claims Administrator also published notice in short form in USA Today on four occasions over a four-week span. Cf. Weigner, 852 F.2d at 651.

The Appellant next contends that the Claims Administrator breached the terms of the California court's order by failing to send the notice to her son. Mrs. Wolfert relies upon a clause of the court-approved Settlement Agreement, which requires the defendants to furnish to class counsel the names of any personal contacts listed on the loan. The agreement, however, does not require that the Claims Administrator send notice to those personal contacts. It requires mailing only to "all Settlement Class members," which is defined as the borrowers or their successors-in-interest at the time of the settlement. The reverse mortgage agreement designated Mrs. Wolfert's son only for the purpose of receiving certain notices of default. The California court's order did not require notice of the settlement to be sent to the son.

Finally, the Appellant argues that the notice failed to sufficiently advise class members that they were losing the right to sue under state law. However, the notice states, The Released Claims include any claims of the described sort, even if the claim has not been asserted in the Action or is too individualized in its facts or relevant law to be suitable for class certification or uniquely arises under the laws of the borrower's home state." [Proposed] Notice of Class Action and Settlement at 8-9 (emphasis added). The notice adequately warned that state law claims were being released

in the settlement.

Accordingly, the settlement notice in the class action case did not violate due process.

Conclusion

Because the District Court correctly ruled that the judgment in the California class action precluded Mrs. Wolfert's claims, the judgment of the District Court is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ELINOR M. WOLFERT,

Plaintiff,

04 Civ. 2398 (CLB)

-against-

Memorandum and Order

TRANSAMERICA HOME FIRST, INC., FINANCIAL FREEDOM SENIOR FUNDING CORPORATION,

Defendants.

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Brieant, J.

By Motion filed October 1, 2004, heard and fully submitted for decision on January 28, 2005, defendant Financial Freedom Senior Funding Corporation seeks to recover legal fees from the unsuccessful Plaintiff. A Motion filed by Plaintiff to impose sanctions on the Defendant for seeking fees has been withdrawn without prejudice.

Familiarity of the reader with the prior proceedings in this case is assumed. There is a pending appeal in this case. However, post judgment applications for attorneys fees and costs are not generally regarded as being precluded by the pendency of an appeal on the merits.

The following facts are assumed to be true for the purposes of this Motion. Mrs. Elinor M. Wolfert, the Plaintiff (since deceased) obtained a so-called "Reverse Mortgage" from the Defendants. The mortgage covered her personal residence in Brooklyn, New York. A Reverse

Mortgage Loan is a means by which an individual, usually an elderly person, may borrow on the equity of his or her home, and the lender pays out so much of the loan proceeds as is necessary in agreed periodic installments over the individual's lifetime, The mortgage debt becomes due when the borrower either sells the property or dies or moves out of the premises.

Mrs. Wolfert entered into the transaction which is the subject of this lawsuit on February 29, 1996, without advice of counsel. The mortgage provided Plaintiff with a $50,000 cash payment up front, discharged her existing first mortgage in the amount of $36,980, required her to purchase a deferred life annuity and paid her $100 per month beginning on March 5, 1996.

Mrs. Wolfert failed to pay real estate taxes when due and, as a result of her declining health, in 2003, moved into her son's home and subsequently decided to sell her vacant house. The failure to pay the taxes and the failure to occupy the home as her principal residence constituted acts of default under the Reverse Mortgage. Mrs. Wolfert found a buyer and a dispute arose as to the amount of the contingent interest due on the sale, and other issues affecting the amount due under the mortgage. Mrs. Wolfert also claimed that the Reverse Mortgage was illegal under New York Law and void *ab initio*. She sued Defendants, who removed the case to this Court.

The significant issues in this case were barred, at least in the opinion of this District Court, by a final judgment in a class action in the state court in California approving the settlement of claims on the part of a national class, the definition of which included Mrs. Wolfert. Mrs. Wolfert did not opt out, and the final judgment of June 16, 2003, barred all of her significant claims in this lawsuit under principles of

issue preclusion and *res judicata*. The remaining claims which were not barred thereafter were withdrawn, and a final judgment entered, which is now on appeal.

The application for legal fees in this case is not based on Rule 11, Fed.R.Civ.P., nor could it be, but rather it is based on a provision in the mortgage which reads in relevant part as follows:

> If you or I fail to meet our obligations under this Loan Agreement or the Security Instrument, and the other of us succeeds in enforcing that document in an arbitration or a legal proceeding, the losing party must pay the prevailing party on demand for the latter's reasonable attorneys and expert witnesses fees and expenses and all other reasonable costs it incurred in connection with the arbitration or legal proceeding.

This litigation is not squarely within the literal terms of the above quoted provision relating to attorneys fees. While it is true that the borrower, Mrs. Wolfert, failed to meet her obligations under the loan agreement, in that she did not pay the taxes in a timely fashion, and moved out of her home, it is not true that the other side, the lender, "succeeded in enforcing that document in a legal proceeding." The legal proceeding was not brought by the lender but by the borrower. The Plaintiff, immediately upon entering into a contract of sale of the premises, obtained an Order from this Court directing her to deposit the sales proceeds in escrow to secure the outcome of the litigation, and ultimately elected simply to pay the lender while maintaining this litigation to recover her damages.

Plaintiff's litigation position in this lawsuit was by no means frivolous. This Court has previously characterized the situation presented as a "classic example of outrageous abuse of the nationwide class action process by state courts." As noted in this Court's prior Memorandum and Order dated July 30, 2004 (now on appeal):

> The nationwide class contained only 1,500 claimants and Mrs. Wolfert became entitled to $2,600 to satisfy what appears to be a viable claim for a far greater amount. Class lawyers in California collected in excess of $2,000.000.00 in fees to adjudicate the claims of the nationwide class. What took place here violates the reasonable expectations of the people of New York including Mrs. Wolfert that their rights under New York statutes and rules affecting a purely local issue of real property law would be administered and adjudicated in New York.
>
> It violated the natural expectations of the New York Legislature and the New York Banking Department that New York State public policy relating to banking and real estate liens be enforced by the state, by its own administration and courts. This abuse cries out for a statutory or judicially crafted remedy to prevent a state such as California, lacking any commitment to or concern for New York public policy in matters such as this, traditionally of local concern, from exercising power over a nationwide class of absentees such as was done here.

The Court concludes that the fee demand is not squarely within the language of the loan agreement, which should be construed strictly against its author. The claim asserted by Mrs. Wolfert appears to be meritorious, and, but for the preclusion imposed upon her by the California State Court, would have been set for trial on the merits by this Court.

The Motion is denied.

SO ORDERED.

Dated: White Plains, New York
January 31, 2005

Charles L. Brieant, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ELINOR WOLFERT

Plaintiff,

04 Civ. 2398 (CLB)

- against -

Memorandum and Order

TRANSAMERICA HOME FIRST, INC. and FINANCIAL FREEDOM SENIOR FUNDING CORPORATION,

Defendant.

----------x

Brieant, J.

By motion filed in this diversity case on May 17, 2004 (Doc. # 10), heard and fully submitted on July 30, 2004, Defendants Transamerica HomeFirst, Inc. ("Transamerica Homefirst") and Financial Freedom Senior Funding Corporation ("Financial Freedom") incorporated in California (hereinafter Defendants are collectively "Transamerica") move this Court for an Order dismissing Plaintiff's Complaint, under Rule 12(b)(6) Fed. R. Civ. P. or in the alternative, staying the proceedings pending arbitration. On oral argument, movants conceded that the Fifth and Seventh Claims may not be dismissed on their face.

Facts

The following well-pleaded facts are assumed for purposes of this motion only. This action is based upon a reverse mortgage and loan agreement entered into by Plaintiff, Ms. Elinor Wolfert and Defendant Transamerica. Plaintiff is a

citizen and resident of New York. Defendant Transamerica Home First, a California corporation, is a predecessor of Financial Freedom Senior Funding Corporation ("Financial Freedom"). Financial Freedom is also a California corporation with its principal place of business in Irvine, California.

Eight years ago, an employee for Transamerica Homefirst solicited Mrs Wolfert at her home, located at 111 Rutland Road, Brooklyn, New York 11225, for purposes of selling Mrs. Wolfert a reverse mortgage loan. A reverse mortgage loan is a means by which an individual, usually an elderly person, may borrow on the equity of his or her home, and the lender pays out so much of the loan proceeds as necessary, in agreed periodic installments over the individual's lifetime. The mortgage debt becomes due when the borrower either sells the property or dies, whichever occurs first. At the time Mrs. Wolfert entered into the reverse mortgage loan with Transamerica, she was a 71 year-old widow. The salesperson for Transamerica allegedly advised Mrs. Wolfert that "she did not need an attorney [and] that it was a very simple transaction." She entered into the transaction on February 29, 1996, without advice of counsel.

This mortgage was held by Defendant Financial Freedom when the lawsuit began. The mortgage provided Plaintiff with a $50,000 cash payment up front, discharged her existing first mortgage lien which had a balance of $36,980, required her to purchase a deferred life annuity and paid her $100 per month beginning on March 5, 1996.

As a result of her declining health, in 2003, Mrs. Wolfert moved into her son's home and subsequently decided to sell her then vacant house. Upon entering into a contract to sell her home on December 23, 2003, Mrs. Wolfert, acting through her son, requested from Financial Freedom both a

preliminary payoff letter and a final payoff letter along with Truth in Lending documentation and calculations. The Final Loan Payoff Demand, as submitted by Financial Freedom on Febraury 26, 2004, was for the amount of $451,546.79, which included a total principal amount of $114,961.79, a non-contingent interest amount of $113,520.00, a contingent interest of $223,000.00 and a satisfaction preparation legal fee of $65.00. The contingent interest was calculated at 50% of the difference between the gross sales consideration and the original appraised value of $240,000.00 on February 26, 1996.

On March 18, 2004, Plaintiff filed a Summons with Notice in state court, alleging among other things, that the reverse mortgage was illegal and void *ab initio*. On March 26, 2004, Transamerica removed this action from state court based on this Court's diversity jurisdiction. Plaintiff served Defendants with her Complaint on April 27, 2004, which set forth eight claims. The first three Claims allege that the reverse mortgage was void *ab initio* because it did not comply with New York State Real Property Law § 280-a and New York State General Regulations of the Banking Board Part. 79. Specifically, Plaintiff contends that the future appreciation element exceeded the 20% limit as set forth in § 280-a, the loan provided for both "equity participation" and a "maturity fee" in violation of New York banking regulations Part 79.6(b), and that the maturity fee was a percentage of gross sales price, which did not represent the actual cost as required by the regulations in Part 79.5(10)(c). The fourth Claim alleges that Defendants committed fraud by knowingly and purposely "under-appraising all of its reverse mortgages sold in New York" resulting in an artificially increased amount due to Defendants. Plaintiff's fifth Claim is for breach of contract based upon Defendants alleged failure to make all the monthly mortgage or annuity payments due to Mrs. Wolfert in the past several years and their failure to

pay the real estate taxes due to the City of New York in accordance with the terms of the reverse mortgage. The sixth Claim is a general allegation that the reverse mortgage is unconscionable and unenforceable. Plaintiff's seventh Claim alleges that in 1996 she did not have the capacity to enter into the reverse mortgage due to "physical and mental infirmities [which] were readily visible to a layperson" and therefore the mortgage is unenforceable. The last Claim is a general claim for fraudulent and deceptive conduct, by Defendants. The Complaint seeks damages ($10,000.000) and that the mortgage and loan agreement be declared void awarding return of approximately $454,214.00 paid to Defendant at the sale of the home.

Defendants contend that Plaintiff's state law claims based on the violations of New York Real Property Law and New York banking regulations are preempted by federal law, specifically the Home Owners' Loan Act, 12 U.S.C. §§ 1461 et seq., ("HOLA") and the Depositary Institutions and Deregulation and Monetary Control Act of 1980, 12 U.S.C. § 1735f 7a ("DIDMCA"). Defendants also contend that New York Property Law § 280-a is inapplicable in this case and instead the governing statute is New York Real Property Law § 280, which they have not violated, However, Defendants primary contention is that a class action settlement agreement entered by the California Superior Court in the County of San Mateo released and barred any and all claims that Plaintiff is asserting, because she was a member of the class, received notice, and failed to opt-out of the case.

Finally, Defendants request that if Plaintiff's complaint is not dismissed in its entirety, the action be stayed to allow for arbitration of the remaining claims pursuant to the provisions in the loan agreement and security instrument.

Discussion

Dismissal under Rule 12(b)(6) is appropriate only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957).

Class Action Settlement Agreement and Judgment

On August 17, 1999, three class actions filed in California state courts against Defendants Transamerica Home First, Inc, Transamerica Corp., Financial Freedom, and Metropolitan Life Insurance Co. which alleged a general fraudulent scheme based upon Reverse Mortgages sold to approximately 2,800 elderly mortgagors, were consolidated in the California State Superior Court in the County of San Mateo. Class Plaintiffs in the actions then filed a Third Amended Complaint alleging that the Defendants violated the California Business and Professions Code § 17203 by their unlawful, unfair and/or fraudulent business practices, committed fraud by concealing material facts, including the limited benefits to the borrower and the total debt-to- value ratio the loan would cause, and made negligent misrepresentations to plaintiffs and class members upon which they relied when executing the reverse mortgage. The terms of the reverse mortgages that Class Plaintiffs contested as unfair and excessive were: (1) the "Contingent Interest"; (2) the "Life Annuity" or deferred annuity charged as Principal; (3) the "Maturity Fee"; and (4) in some mortgages the "Equity Sharing" provision. The Plaintiffs' complaint alleged that the arbitration clause was also unfair as it required arbitration for disputes brought by the borrower but allowed Transamerica to proceed with judicial action to foreclose. Class Plaintiffs also contend that the sales techniques and in-home solicitations conducted by Defendants were conducted with willful misrepresentations.

One of the class action plaintiffs, Margaret Mickey, represented the interests of a New York mortgagor (as an estate fiduciary), but the Third Amended Complaint did not cite the New York statutes mentioned in the Complaint in this case.

On September 3, 2003, the California Superior Court, while certifying the class as a nationwide class, declined to enforce choice-of-law clauses in each of the loan agreements. The choice-of-law clauses provided that the governing law would be the law of the state in which the borrower resided at the time the mortgage was executed. The Court held that California state law should apply to all the transactions nationwide. The California Court denied Plaintiff's request to have the fraudulent concealment and negligent misrepresentation claims resolved on a classwide basis, finding that individual factual issues predominated over any common factual issues.

Thereafter, on December 20, 2003, the California Superior Court approved a proposed settlement agreement and class notice. The class notice described in customary fashion, among other things, the nature of the action, the individuals whose rights may be affected, the terms of the settlement agreement, what claims would be released as a result of the settlement, and the procedures to participate or to opt-out, as well as provided the date and location for the fairness hearing. Class notice was sent by first class mail, and notice was also published in the national edition of the *USA Today*, once a week for four consecutive weeks in January 2003. Mrs. Wolfert received the notice. She failed to opt out of the class within the time permitted by the California Court. Her transaction clearly brings her within the class as defined.

The Proposed Settlement Agreement defined the class as

> (a) Individuals who at any time prior to January 1, 1999, entered into a reverse mortgage loan with Transamerica Homefirst, Inc., which charged the following fees: (1) "Contingent Interest" of 50% of the appreciation value of the borrower's property between the date the loan was made and the date it became or becomes due; and (2) a premium for a deferred annuity acquired as part of the loan; and/or (3) a "maturity Fee" of 2% of the value of the property at the loan's maturity. These loans consist of all those reverse mortgage loans identified by the trade name "Lifetime" of which there were 1,588 according to the Defendants' records. They exclude those known by the trade name "Cash Account" as well as all other reverse mortgage products, if any, offered by any of the Defendants. Any included loans which have not yet come due are now being serviced by Financial Freedom Senior Funding Corporation;
>
> (b) Legal successors-in-interest (Such a conservators, executors, administrators, or guardians) of any borrower described in paragraph 1, above;
>
> and
>
> (c) Heirs of any borrowers described in paragraph 1, above, who has died and who does not have a legal successor-in-interest as defined in paragraph 2, above. Horowitz Aff. Ex. D, Judgment on Final Approval of Class Settlement. ¶ 6.

The Settlement agreement provided for the payment of $8 million by Defendants to the settlement fund, which after deducting attorneys' fees and disbursements, would be

distributed in accordance with the Plan of Allocation. As a member of the defined class and as provided by this settlement, Mrs. Wolfert would be entitled to approximately $2,600, compared to the $454,214 she is claiming in this action. Class counsel was awarded fees and disbursements of approximately $2.6 million.

Under the terms of the Settlement Agreement class members who did not opt out released the following claims as against Defendants:

> any and all causes of action, claims, rights, damages, liabilities, expenses and losses of any kind arising now or in the future out of or in connection with or related to the facts and claims alleged or asserted in any of the complaints filed in the Litigation or the terms or administration of this Settlement Agreement, whether presently known or unknown, asserted or unasserted, that any of the Releasing Persons have, may have had, or may claim to have against any of the Released Persons under federal law or the law of any state or locality, including consumer protection laws (the "Released Claims"). The Released Claims include without limitation any claim regarding the suitability, design, marketing, solicitation, development, application, underwriting, acceptance, sale, purchase or charges of the Reverse Mortgage Loans or annuities, or any claim that the Reverse Mortgage Loans or annuities were deceptively or fraudulently marketed, that any of the Defendants concealed or failed to disclose any of the terms of the Reverse Mortgage Loans or annuities, that any of the terms of the Reverse Mortgage Loans or annuities were unfair or unlawful, and that any of the deferred annuities issued or required to be issued as part of the Reverse Mortgage Loans that are at issue in the

> Litigation should have been or should be priced or structured differently or modified in any manner whatsoever. The Released Claims also include any claim for attorneys' fees against any of the Released Persons. The Parties agree this Settlement Agreement will not affect in any way the existing obligations of any Reverse Mortgage Loans or related Annuity. For example, HomeFirst, MetLife and Transamerica Occidental Life Insurance Company will still be obligated to make monthly payments in accordance with the terms of the Reverse Mortgage Loan documents and annuity certificates, and the borrower will still be obligated to pay off the loan pursuant to the terms of the Reverse Mortgage Loan documents. Accordingly, the Releasing Persons do not release any claims they may have or which may arise from a past or future breach of the Defendants' obligations to make monthly payments under the terms of the Reverse Mortgage Loans and related annuities. Settlement Agreement And Release, ¶ IX.
> (Emphasis added)

On June 16, 2003, the San Mateo Superior Court entered a final judgment, certifying the settlement class, approving the Settlement Agreement and enjoining all class members, except those members that opted-out, from "filing or commencing any lawsuit in any jurisdiction "based on or relating to the claims and causes of action, or the facts and circumstances relating thereto, in this Action that have been released through the settlement." Final Judgment ¶¶ 17, 19. The Court found that the "{n]amed Plaintiffs' claims are typical of those of the Class and the named Plaintiffs have adequately represented both "Open Loan" and Closed Loan" class members located in California, *New York*, New Jersey, Pennsylvania, Florida, Connecticut, Illinois, Maryland, Virginia, Washington, Michigan and the District of

Columbia." Final Judgment, ¶ 16 (emphasis added). The lone Objectors in the consolidated class action appealed to the First Appellate District, which on March 26, 2004, affirmed the adequacy of notice to class members and the fairness of the settlement.

Mrs. Wolfert contends that she is not bound by this class action settlement on due process grounds and also because her claims are different, in that Mrs, Wolfert is asserting violations of New York State Statutes and Banking Regulations which do not have a comparable California counterpart. The Court finds no due process violations. Class Notice was given in the customary fashion as provided by California law and as set forth by Supreme Court cases.[1]

Plaintiff, a member of the class as defined, received actual notice[2], failed to opt-out of the class action and is thus bound by its final judgment, thus her claims in this lawsuit are precluded. This Court cannot disregard Plaintiff's failure to opt-out, nor can it disregard the class settlement agreement approved by, and the final judgment entered by the California State Court.

This case, assuming the truth of the allegations, as we must, is a classic example of outrageous abuse of the nationwide class action process by state courts. The nationwide class contained only 1,500 claimants. (Tr. at 7). Mrs. Wolfert became entitled to $2,600 to satisfy what appears to be a viable claim for a far greater amount.

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[1] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985).

[2] The California Superior Court's requirement to publish the notice in the national edition of the *USA Today* for four consecutive weeks provided constructive notice to both Mrs. Wolfert and her son, Mr.

Class lawyers in California collected in excess of $2,000,000.00 in fees to adjudicate the claims of the nationwide class. What took place here violates the reasonable expectations of the people of New York including Mrs. Wolfert, that their rights under New York statutes and rules affecting a purely local issue of real property law would be administered and adjudicated in New York. It violated the natural expectations of the New York Legislature, and the New York Banking Department that New York State public policy relating to banking and real estate liens be enforced in the state, by its own administration and courts. This abuse cries out for a statutory or judicially crafted remedy to prevent a state such as California, lacking any commitment to or concern for New York public policy in matters such as this, traditionally of local concern, from exercising power over a nationwide class of absentees such as was done here.[3] This Court must give full faith and credit to the California judgment. *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 374 (1996) ("[a] judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit under the express terms of the [28 U.S.C. § 1738]).

Wolfert. The Superior Court, as well as the California Appellate Court, concluded that the notices were sufficient to provide potential class members with notice of the class action and settlement. The Superior Court acknowledged that not every member may receive actual notice, but it found that the means implemented were the best practicable methods in light of the circumstances of the case.

[3]Mrs. Wolfert never entered California and never subjected her person to the traditional jurisdiction of California.

The California State Court approved the Settlement Agreement, after adequate notice, as a reasonable and adequate settlement, and after considering various factors including the risks and benefits associated with litigation. The release language contained in the final settlement agreement and judgment bars Plaintiff from filing any claims that arise out of or are related to the facts and claims in the California litigation including those arising under New York Law. This includes claims that do not arise under California state law or that were not specifically pleaded by the Class Plaintiffs in the Third Amended Complaint. *See* Settlement Agreement and Release, ¶ IX (A) (releasing any "asserted or unasserted [claims] that any of the Releasing Persons have, may have had, or may claim to have against any of the Released Persons under federal law or the law of any state or locality"). Plaintiff's first, second, third, fourth, sixth and eighth claims allege conduct that falls within the scope of the released claims. Accordingly, these claims are dismissed as barred by claim preclusion arising out of the California judgment.

Non-Released Claims

Plaintiff's remaining claims allege breach of contract for failure to make monthly payments (fifth Claim) and incapacity of the Plaintiff to enter into a contract (seventh claim). These Claims do not fall within the scope of Claims released pursuant to the settlement agreement. "Releasing Persons do not release any claims they may have or which may arise from a past or future breach of the defendants' obligations to make monthly payments under the terms of the reverse mortgage loans and related annuities." Settlement Agreement and Release, ¶¶ IX (A). Nor are these claims preempted by federal law, as they are state common law contract claims. Therefore, Defendant's only remaining argument on this motion that is applicable to these Claims, is

that the action should be stayed pending arbitration, because provisions within the loan agreement and security instrument require the Plaintiff to submit the dispute to arbitration. Plaintiff opposes a stay of the proceedings, contending that the arbitration provisions are unconscionable and unenforceable.

The loan agreement and the mortgage contain almost identical arbitration clauses:

> Any controversy or claim arising out of or relating to this Loan Agreement, the Security Instrument or any other document relating to the Loan, the breach of any of them or the default under any of them, other than an action or proceeding to foreclose on the Property pursuant to the Security Instrument, will be settled by binding arbitration under the jurisdiction of the American Arbitration Association in accordance with its Commercial Arbitration Rules....

Loan Agreement, ¶ 20.

In determining whether a dispute is arbitrable under the Federal Arbitration Act ("FAA"), a valid agreement must exist and the dispute must fall within the scope of the arbitration agreement. *See Hartford Ace. and Indem. Co. v. Swiss Reinsurance America Corp.*, 246 F.3d 219, 226 (2d Cir. 2001). Federal policy favors arbitration and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S, 614, 626 (1985). However that does not relieve a Court from its duty to "remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract." *Mitsubishi Motors Corp.*, 473 U.S. at 627.

Plaintiff contends that she did not possess the adequate capacity necessary to enter into the loan agreement and to execute a reverse mortgage with Defendants. Specifically, she claims that she suffers from extremely frail health, mental incompetency and failing eyesight: rendering her incapable of understanding the loan documents. Pl.'s Compl. ¶¶ 22, 53. Assuming these allegations to be true, as this Court must for purposes of this motion, Plaintiff's contract, including the arbitration provisions, would be void and unenforceable. Additionally, Plaintiff has also pleaded "well-supported claims" of Defendants' fraudulent conduct concerning the reverse mortgage loan agreement which "would provide grounds for the revocation of [this] contract." The Court declines on the present record to enforce the arbitration provisions in the loan agreement and the mortgage because there are unresolved fact issues which affect the arbitration issue. The same arbitration provisions in Defendants' loan agreement, have been held unenforceable with respect to other borrowers. *See, e.g., Flores v. Transamerica Homefirst*, 93 Cal. App. 4th 846, 854 (Ct. App. 2001) (finding that the arbitration agreement to be a contract of adhesion and procedurally unconscionable).

Accordingly, the Court declines on the present record to stay the action on the two remaining claims pending arbitration.

Conclusion

Defendants' motion is granted in part and denied in part. All claims, except for Plaintiff's Fifth and Seventh Claims, are dismissed with prejudice. The Court declines to make the findings contemplated by Fed. R. Civ. P. 54(b).

SO ORDERED.

Dated: White Plains, New York
July 30, 2004

Charles L. Brieant, U.S.D.J.